

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JEFFREY A. AND JUDITH GOUGH) No. 84A-536

For Appellants: Richard M. Pearl
Attorney at Law

For Respondent: Patricia I. Hart
Counsel

O P I N I O N

This appeal is made pursuant to section 18593^{1/} of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Jeffrey A. and Judith Gough against a proposed assessment of additional personal income tax in the amount of \$775 for the year 1982.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in issue.

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The issue presented by this appeal is whether appellants were entitled to a claimed energy conservation tax credit for the year 1982.

In 1982, appellants installed thermal windows in their residence in El Cerrito, California. On their joint California tax return for 1982, appellants claimed an energy conservation tax credit of \$775. On review of appellant's return, respondent discovered that appellants had not obtained a recommendation of a Residential Conservation Service (RCS) audit prior to the installation of the thermal windows. Consequently, respondent determined that the claimed credit should be disallowed in its entirety and issued the proposed assessment of additional tax at issue in this appeal on October 4, 1983.

Subsequently, appellants protested the proposed assessment and requested that Pacific Gas and Electric perform an RCS audit in their home. On November 22, 1983, the utility company conducted the home energy audit and found the thermal windows to be "recommended energy conservation measures." (Appeal Ltr., Ex. A.) Appellants then submitted the audit report to the Franchise Tax Board to establish the eligibility of the thermal windows for the tax credit. When respondent denied their protest, appellants filed this timely appeal.

For the year in question, section 17052.4^{2/} provided for a tax credit in an amount equal to 40 percent of the costs incurred by a taxpayer for an energy conservation measure installed on the taxpayer's premises in California. The maximum allowable credit was \$1,500 for each premise. The term "energy conservation measure" was defined as any item with a useful life of at least three years falling within a specified generic category of measures which met the minimum standards established for that category. (Rev. & Tax. Code, § 17052.4, subd. (h)(6).) For existing dwellings, certain energy conservation measures were required to have been approved and adopted as part of a Residential Conservation Plan and recommended as the result of an audit conducted under the auspices of such a plan. (Rev. & Tax. Code, § 17052.4,

^{2/} All of our references are to former section 17052.4, entitled, "Energy Conservation Tax Credit," which was renumbered section 17052.8 by statutes 1983, chapter 323, section 83, No. 3 Deering's Advance Legislative Service, page 987.

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subd. (h)(6)(H).) Among the measures included within this generic category were thermal **windows for** the exterior of dwellings. (Rev. & Tax. Code, § 17052.4, subd. (h)(6)(H) (iii).) The Energy Resources Conservation and Development Commission (Energy Commission) was authorized to establish the minimum standards regarding the eligibility of any item of a generic category of energy conservation measures. (Rev. & Tax. Code, § 17052.4, subd. (f).)

Regulations promulgated by the Energy Commission set forth three classes of energy conservation measures eligible for the tax credit when installed in existing residences in 1982.^{3/} First, certain listed conservation measures, such as ceiling insulation, weatherstripping, and water heater insulation qualified for the tax credit without an RCS audit when installed on any premise. (Cal. Admin. Code, tit. 26, reg. 2613.) Second, after January 1, 1982, other specified measures complying with predetermined energy standards required an RCS audit to be eligible for the tax credit unless the residence was located in a region of the state where home energy audits were not available through an RCS program. (Cal. Admin. Code, tit. 20, reg. 2614, subd. (a).) Third, all other energy conservation measures not specifically listed in the regulations must have been recommended for installation as the result of an RCS audit to be eligible for the credit. (Cal. Admin. Code, tit. 20, reg. 2614, subd. (b).) Any energy conservation measure was required to meet both the applicable definition and eligibility criteria set forth for the device. (Cal. Admin. Code, tit. 20, reg. 2612; reg. 2614, subd. (b).) Under the regulations, thermal windows were specifically included among the second category of measures that were eligible for the tax credit after January 1, 1982, if recommended by an RCS audit. (Cal. Admin. Code, tit. 20, reg. 2615, subd. (c).)^{4/} Thus, under the statute

3/ Unless otherwise specified, all references to regulations are to the California Tax Credit Regulations, California Administrative Code, title 20, chapter 2, subchapter 8, article 2, effective January 1, 1981, amendment filed Feb. 11, 1982 (Register 82, No. 7).

4/ Thermal window was defined as a window unit with improved thermal performance due to the use of two or more sheets of glazing material affixed to a window frame to create one or more insulated air spaces; it may include an insulating **frame and** sash. (Cal. Admin. Code, **tit.** 20, reg. 2612, subd. (1).)

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and regulations, to successfully establish the eligibility of thermal windows for the 1982 energy conservation tax credit, a taxpayer must not only demonstrate that the thermal windows complied with the pertinent construction and installation standards but also show that installation was recommended by an RCS auditor.

It is well settled that determinations of the Franchise Tax Board in regard to the imposition of taxes are presumptively correct, and the taxpayer has the burden of demonstrating error in those determinations. (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949); Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) In the present appeal, appellants did not obtain an RCS audit recommendation prior to their installation of the thermal windows. Rather, they had a home energy audit performed by their utility company after they installed the energy saving device and after they claimed the tax credit on their return. Thus, appellants do not dispute that an RCS audit was available in their area. Appellants argue instead that the statute did not require the RCS audit to be conducted prior to installation of the energy conservation measure. Appellants contend that the credit should be allowed so long as a home energy audit indicated that the installed measure was "an efficient and effective energy conservation measure." (Appeal Ltr. at 2.) Appellants' position is not well taken. In Appeal of Richard M. Nederostek and Catherine C. Carney, decided by this board on October 9, 1985, the taxpayers made the similar argument that a post-installation audit confirming the energy savings of a replacement furnace was sufficient for purposes of the energy conservation tax credit statute. We rejected that argument based on the language of section 17052.4, subd. (h)(6)(H), which defined an eligible energy conservation measure as one recommended by an RCS audit, and the interpretation given the statute by the Energy Commission, which has always subscribed to the rule that the audit be conducted prior to installation of the device. (See also Appeal of John and Linda Coreschi, Cal. St. Bd. of Equal., Nov. 14, 1984.) We see no reason to deviate from that holding in this appeal, especially when we consider that the statute specifically listed thermal windows among the generic category of measures requiring the recommendation of an RCS audit. (Rev. & Tax. Code, § 17052.4, subd. (h)(6)(H)(iii).) Moreover, contrary to appellant's assertion, we do not find the Energy Commission regulations to be incomprehensible in following the mandate of the Legislature that the audit be performed prior to installation of the energy-saving

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device. When read in conjunction with the subsequent regulation containing the eligibility criteria, regulation 2614 is more explicit, if anything, in providing that an audit was a condition of qualification for the tax credit.

Finally, appellants contend that they installed their thermal windows without obtaining a prior RCS audit in reliance on respondent's instructions for completing the schedule for claiming energy conservation tax credit and on the advice of their utility company. Appellants argue that the instructions of the Franchise Tax Board did not indicate that a prior audit was necessary and the utility company informed them that a post-installation audit was a permissible alternative. Thus, appellants make the apparent argument that respondent should be estopped from disallowing the credit.

In general, estoppel will be invoked against the government in a tax case only in those situations where the facts clearly establish that grave injustice would otherwise result: (California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal.2d 865, 869 [350 P.2d 715] (1960); United States Fid. & Guar. Co. v. State Board of Equal., 47 Cal.2d 384 [303 P.2d 1034] (1956); Appeal of James R. and Jane R. Miller, Cal. St. Bd. of Equal., July 31, 1973.) Four conditions must be satisfied before the doctrine of equitable estoppel can be applied: (1) the party to be estopped must be apprised of the facts; (2) the other party must be ignorant of the true state of the facts; (3) the party to be estopped must have intended that its conduct be acted upon, or so act that the other party had a right to believe that it was so intended; and (4) the other party must rely on the conduct to his injury or detriment. (California Cigarette Concessions, Inc. v. City of Los Angeles, supra; City of Long Beach v. Mansell, 3 Cal.3d 462, 489 [476 P.2d 423] (1970); Appeal of Jack and Sandra M. Sanguin, Cal. St. Bd. of Equal., Sept. 15, 1983.)

In the instant matter, we observe at the outset that appellants have failed to offer any evidence that the four conditions to estoppel were present in their case. With regard to estoppel against the Franchise Tax Board, this board has previously refused to apply the doctrine where taxpayers have understated their tax liability on tax returns in alleged reliance on ambiguous or erroneous instructions contained in respondent's tax forms. (Appeal of Marvin W. and Iva G. Simmons, Cal. St. Bd. of Equal., July 26, 1976; Appeal of Norman L. and

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Penelope A. Sakamoto, Cal. St. Bd. of Equal., May 10, 1977.) Nevertheless, when we review the instructions for the 1982 energy conservation tax credit schedule, we find no statements that may have misled appellants into thinking that an RCS audit was not required before installation of their measure. The instructions explain that exterior shading devices and multiglazed windows may qualify when installed on the recommendation of an RCS auditor and directs the taxpayer to the regulations. As for the argument that respondent **should** be estopped from disallowing the credit due to misinformation from the utility company, we have stated on prior decisions that the Franchise Tax Board will not be estopped from disallowing a tax credit where a different agency allegedly failed to inform a taxpayer of the proper legal requirements for the credit. (Appeal of John and Linda Coreschi, Cal. St. Bd. of Equal., Nov. 14 1984; Appeal of E. J., Jr., and Dorothy Saal, Cal. St. Bd. of Equal., Feb. 1, 1983. Thus, we cannot find that this is a proper case for the application of the estoppel doctrine.

Based on the foregoing, we find that appellants have not established error in respondent's determination that their claimed energy conservation tax credit should be disallowed for failure to obtain a prior RCS audit recommendation. Accordingly, respondent's action in this matter must be sustained.

